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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING
LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S PRÉCIS IN
SUPPORT OF ITS REQUEST TO FILE A
MOTION *IN LIMINE* TO PRECLUDE
EVIDENCE OR ARGUMENT
REGARDING UBER'S USE OF
EPHEMERAL COMMUNICATIONS,
NON-ATTRIBUTABLE DEVICES OR
IMPROPER PRIVILEGE
DESIGNATIONS**

Date: TBD

Time: TBD

Ctrm: 8, 19th Floor

Judge: Honorable William H. Alsup

Trial Date: February 5, 2018

1 Plaintiff Waymo LLC (“Waymo”) submits this précis requesting permission to file a motion
 2 *in limine* to preclude evidence or argument that Uber does not use ephemeral communications, non-
 3 attributable devices, or improper privilege designations for the purpose of avoiding discovery.
 4 Waymo expects that Uber will make this argument if Waymo introduces Richard Jacobs’ allegations
 5 about such conduct because Uber asserted in a written response to one of Waymo’s 30(b)(6) topics
 6 that Uber does “not improperly ‘use . . . methods or strategies to conceal facts from discovery by
 7 external parties in litigation or government investigation.” Uber, however, should be precluded
 8 from presenting such testimony and argument—which goes to the heart of the issues on which this
 9 Court granted additional discovery after continuing trial a second time—because Uber’s 30(b)(6)
 10 witness on these issues was unprepared to testify as to Uber’s knowledge on these issues.

11 **I. BACKGROUND**

12 After Mr. Jacobs’ May 5, 2017 letter (“Jacobs Letter”) came to light, this Court continued
 13 the trial date in this matter. The Jacobs Letter included allegations that Uber uses ephemeral and
 14 encrypted communications, non-attributable devices, improper attorney-client privilege
 15 designations, anonymous servers, and other methods, to conceal facts from discovery in litigation.
 16 (Dkt. 2401-1.) Mr. Jacobs alleges, for example, that “Henley and Clark implemented this program
 17 of ephemeral and encrypted communications for the express purpose of destroying evidence of
 18 illegal or unethical practices to avoid discovery in actual or potential litigation.” (*Id.* at 6.) He
 19 further asserts “Clark and Henley directly instructed Jacobs to conceal documents . . . by attempting
 20 to ‘shroud’ them with attorney-client privilege or work product protections.” (*Id.* at 6-7.)
 21 Regarding the use of Wickr by Uber for business purposes, the Court remarked:

22 So it would be a way for someone to – Levandowski or someone communicating
 23 with him to say: By the way, how did we do that back at Waymo? How did we
 24 solve that problem? Well, easy, we used “X” instead of “Y.” And all that vanishes
 in 30 seconds. You don’t have to have a blueprint. You just ask the question: How
 did we do it at Waymo?”

25 (11/29/17 Hr’g Tr. 153:17-22.) The Court predicted that the allegations in the Jacobs Letter are
 26 “probably going to be a substantial issue at trial.” (*Id.*, 154:13-14.) The Court further ordered
 27
 28

1 Uber to produce evidence regarding its employees' use of ephemeral communications, non-
 2 attributable devices, and false privilege assertions. (*Id.*, 147:10-15, 149:3-5.)¹

3 On December 7, 2017, Waymo served a Notice of Rule 30(b)(6) Deposition on Uber. The
 4 notice included the following Topics:

5 **Topic 2:** DEFENDANTS' use of methods or strategies to conceal facts from
 6 discovery by external parties in litigation or government investigations, including
 7 use of improper attorney-client and other privilege designations, ephemeral or
 8 encrypted communications, non-attributable devices, or anonymous servers, and
 9 any policies, instructions, advice, or guidance provided to UBER employees
 10 REGARDING these methods or strategies.

11 **Topic 3:** DEFENDANTS' use of improper attorney-client and other privilege
 12 designations in connection with (1) UBER's acquisition of OTTOMOTTO and the
 13 negotiations that led to the acquisition; (2) DEFENDANTS' development of
 14 LiDAR; and (3) GOOGLE or WAYMO.

15 Uber asserted objections to these topics, but agreed, in response to Topic 2, to produce a witness
 16 to testify "regarding [its] document retention policies and their policies and practices relating to
 17 the preservation of evidence in connection with litigation and government investigations during
 18 the time period relevant to this litigation, including any related guidance provided to employees
 19 regarding such matters;" and in response to Topic 3, to produce a witness to testify that Uber does
 20 not use improper privilege designations in connection with the subject matter therein.

21 Uber designated Randy Haimovici to testify on Topic 2 and Topic 3(3). He was not
 22 prepared to do so. Specifically, Mr. Haimovici was not prepared to testify about Uber employees'
 23 practices regarding use of improper attorney-client and other privilege designations and ephemeral
 24 or encrypted communications (Topic 2). He admitted that he was only prepared to testify
 25 regarding Uber's "official" corporate practices, saying: "[REDACTED]
 26 [REDACTED]" (Randy Haimovici 12/21/17 Depo. 149:24-150:11)
 27 (emphasis added). But, even if the company does not have a formal "policy" of using ephemeral
 28 communications for the purpose of concealing evidence in discovery, for example, a practice of
 doing so by employees, bears on whether this strategy was used. Mr. Haimovici [REDACTED]
 [REDACTED]. (*Id.*, 21:23-

¹ As explained in Waymo's Offer of Proof, Uber did not fully comply with this Order. (Dkt. 2466 at 19, 20.)

24:5 (explaining [REDACTED])
 [REDACTED]
 [REDACTED]
 [REDACTED]; *id.*, 113:22-114:5, 114:11-115:2.) [REDACTED]
 [REDACTED]
 (*Id.*, 99:20-100:1, 129:10-25.) As a result, Mr. Haimovici was not prepared to testify on the full scope of Topic 2 and did not know the answers to very basic questions, such as whether employees use ephemeral communications because they would not be retained for long periods of time (*id.*, 95:1-11); whether employees use ephemeral communications so that a paper trail wouldn't be created (*id.*, 95:12-20); whether, excluding instances where there is a litigation hold in place, Uber employees use ephemeral communications to avoid discovery in litigation (*id.*, 96:9-19); whether Uber employees include attorneys in the "to" line of emails so that Uber can argue that the email is privileged (*id.*, 132:17-25); and whether employees are moved to different departments to conceal facts (*id.*, 186:23-187:4). Additionally, with respect to Topic 3 part 3, Mr. Haimovici admitted that [REDACTED]
 [REDACTED]. (*Id.*, 148:4-12, 148:21-149:7.)

II. ARGUMENT

Federal Rule of Civil Procedure 37 grants this Court the authority to impose sanctions—including preclusion sanctions—when a party violates a discovery order. *FormFactor, Inc v. Micro-Probe, Inc.*, No. C-10-03095 PJH JCS, 2012 WL 1575093, at *2 (N.D. Cal. May 3, 2012); Fed. R. Civ. P. 37(b). Sanctions are also available for failure to provide information or identify a witness under Federal Rule of Civil Procedure 26(a) or (e), or for failing to produce an adequately prepared 30(b)(6) witness where such failure is tantamount to a failure to appear. *FormFactor*, 2012 WL 1575093, at *3; Fed. R. Civ. P. 37(c)(1) and (d). Where a corporation withholds evidence under the guise of its 30(b)(6) designee's ignorance, the appropriate remedy is to preclude the corporation from later producing evidence on the topic. *Vnus Med. Techs., Inc. v. Diomed Holdings, Inc.*, 2007 WL 3096586, at *2 (N.D. Cal. Oct. 22, 2007) (granting motion *in limine* precluding testimony on topics on which corporate designee could not testify during

1 deposition). Federal courts have consistently instructed that a corporation cannot designate a
 2 30(b)(6) representative who disclaims corporate knowledge of a subject during discovery, but then
 3 later introduces evidence on that subject at trial. *See id.*; *Avago Techs., Inc. v. IPtronics Inc.*, No.
 4 5:10-CV-02863-EJD, 2015 WL 2395941, at *1 (N.D. Cal. May 19, 2015) (explaining the purpose
 5 of Rule 30(b)(6) is to avoid a situation where the corporation engages in “bandying”—where an
 6 individual designee disclaims knowledge on a topic clearly known to persons within the
 7 organization); *Ierardi v. Lorillard, Inc.*, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991) (“Under
 8 Rule 30(b)(6), [the organization] has an obligation to prepare its designee to be able to give
 9 binding answers on behalf of [the organization]. If the designee testifies that [the organization]
 10 does not know the answer to [the deposing attorney]’s questions, [the organization] will not be
 11 allowed to effectively change its answer by introducing evidence during trial. The very purpose of
 12 discovery is to avoid trial by ambush.’”)

13 Here, Uber should be precluded from introducing any evidence or testimony claiming that
 14 its employees do not use ephemeral communications, non-attributable devices, improper privilege
 15 designations, anonymous servers, or other strategies or methods to avoid discovery because its
 16 30(b)(6) witness was not prepared to testify on this topic. Mr. Haimovici was only prepared to
 17 testify regarding official company policies, and not prepared to testify regarding Uber employees’
 18 practices as to use of ephemeral communications, non-attributable devices, improper privilege
 19 designations, or other methods, to avoid discovery. This is tantamount to failure to appear in light
 20 of the noticed topics and their importance to the issues in the Jacobs Letter. Given the witness’
 21 lack of knowledge of these topics, Uber should not be permitted to present evidence or argument
 22 on these topics at trial.

23 To hold otherwise will prejudice Waymo’s ability to put on its case. Testimony regarding
 24 Topic 2 in particular would be prejudicial to Waymo if offered at trial, because Uber’s
 25 withholding of discovery leaves Waymo subject to trial by ambush. Whether Uber’s employees
 26 used ephemeral communications, non-attributable devices, false privilege designations,
 27 anonymous servers, or other methods or strategies for the purpose of avoiding discovery is likely
 28 to be a “substantial issue at trial.” (11/29/17 Hr’g Tr., 154:13-14.) As the Court recognized when

1 continuing the trial date for a second time, Uber may have used such practices to hide evidence of
2 trade secret theft. (*Id.*, 153:17-22.) Given the importance of this issue—and Uber’s failure to
3 produce an adequately prepared witness—Uber should not be permitted to argue that its
4 employees do not use and did not use these evasive tactics. Instead, Uber should be precluded
5 from offering any evidence or testimony regarding Topics 2 and 3(3).

6 **CONCLUSION**

7 For the foregoing reasons, Waymo requests leave to file a motion *in limine* on this issue.

8 DATED: January 17, 2018

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LLP

9
10 By /s/ Charles K. Verhoeven

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